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November 4, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

**Re: Notice of Ex Parte Presentation in Wireline and Cable Modem Broadband
Internet Access Proceedings -- CC Docket Nos. 95-20, 98-10 and 02-33, and
CS Docket No. 02-52**

Dear Ms. Dortch:

On November 3, 2003, representatives of the United States Internet Service Providers Association ("US ISPA") and several of its member companies met members of the Commission staff to address certain issues raised in the above-referenced proceedings. The participants in the meeting included: Stewart Baker and Carlos Nalda, Steptoe & Johnson; Kate Dean, Manager, US ISPA; Christopher Bubb, America Online, Inc.; John Goodman, Verizon Communications, Inc.; and (by telephone) Thomas Dailey, Verizon Online Services, Inc.; Lloyd Nault, BellSouth Corporation; Keith Epstein, SBC Communications; and Larry Fenster, MCI, Inc. Members of the Commission staff present at the meeting included Kyle Dixon, Jamilla Bess Johnson, John Norton, Peter Corea, Peggy Greene and Alison Greenwald of the Media Bureau; Tom Beers and Cathy Carpino of the Wireline Competition Bureau; and Julius Knapp of the Office of Engineering and Technology.

The primary purpose of the meeting was to address certain issues raised by the Federal Bureau of Investigation (FBI) in a series of *ex parte* presentations in these proceedings regarding CALEA and broadband internet/VoIP services.¹ The issues raised by the FBI involve unique and complex legal, technical and policy issues that have not been addressed adequately in the context of these proceedings. As a result, there is insufficient evidence in the record of these proceedings to draw meaningful conclusions with respect to the CALEA-related issues raised by the FBI, and US ISPA urges the Commission to address these issues in the context of a separate proceeding.

¹ See, e.g., Letter from Martin J. King, Office of the General Counsel, FBI to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 95-20, 98-10 and 02-33, and CS Docket No. 02-52 (filed July 11, 2003).

US ISPA members take the issue of lawful interception very seriously. They have taken extensive measures to ensure that intercept warrants received from law enforcement can be executed efficiently and effectively, and they will continue to cooperate with law enforcement on these important matters. In this connection, US ISPA would note that law enforcement interception of broadband internet/VoIP traffic has been quite limited, and that ISPs have generally been able to satisfy those requests. Thus, US ISPA is unaware of any immediate crisis that would require immediate action on the issues raised in the FBI *ex partes*. Moreover, given that ISPs typically can satisfy law enforcement intercept requests, it is not clear that FCC determinations under CALEA are required to address law enforcement interception needs.

US ISPA also questions the legal analysis set forth in the FBI's *ex partes*. CALEA specifically defines a "telecommunications carrier" as a "person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire." (See CALEA, §102(8)(A)). To the extent they are engaged in providing information services, ISPs are not common carriers that provide a telecommunications service, and the legislative history of CALEA confirms that ISPs were expressly excluded from the term "telecommunications carrier."² Moreover, even assuming ISPs could conceivably be included under Section 102(8)(B)(ii) of CALEA as "providing wire or electronic communication switching or transmission service," such service is not a "replacement for a substantial portion of the local exchange service."³

Virtually every computer is capable of transmitting digital voice traffic in a variety of different applications; therefore, the scope of the CALEA-related arguments in the FBI *ex partes* is not clear. For example, even assuming CALEA's information services exception is inapplicable, real-time internet gaming sessions, voice-enabled Internet chat, instant messaging services, packetized voice mail and other services do not appear to be the telephony-type services contemplated under the statute. They would, however, be included under the FBI proposed outcome. In addition, Internet-related products and services are provided by a wide variety of different industry participants that include, among others, ISPs and network providers that carry traffic, software developers that provide applications that run on individual computers, and service providers that offer services to Internet users from a web-based portal. In the context of the various types of voice traffic, ISPs cannot know whether an individual Internet user has

² "The definition of telecommunications carrier does not include persons or entities to the extent they are engaged in providing information services, such as electronic mail providers, on-line service providers, such as CompuServe, Prodigy, America-On-line [sic] or Mead Data, or Internet Service Providers." House Rept. 103-827 at 22.

³ The FBI suggests that broadband telephony is already a replacement for a substantial portion of the local telephone exchange service, judging from the geographic reach of the service, the service features and the number of subscribers. However, the legislative history of CALEA makes clear that the test is whether a person or entity actually "serves as a replacement for the local telephone service to a substantial portion of the public within a state." House Rept. 103-827 at 22. Given the extremely limited adoption of VoIP services, even if ISPs were considered covered carriers, such services are not a "replacement for a substantial portion of the local exchange service."

obtained a third-party software package to conduct voice communications over the Internet or is using a web-based provider, nor would ISPs have access to the software necessary to decode such communications.

Finally, US ISPA would note that while the issues raised in these proceedings are potentially related to the CALEA issues outlined in the FBI *ex partes*, the Commission's determinations in these proceedings would not necessarily dictate the outcome of the issues raised by the FBI. Accordingly, the Commission may move forward in the instant proceedings without unduly prejudicing the outcome of the CALEA-related issues to be addressed in a separate proceeding.

Any questions regarding this matter may be directed to the undersigned.

Sincerely,

s/ Stewart A. Baker

Stewart A. Baker

Carlos M. Nalda

Counsel for US ISPA

cc: Kyle Dixon
Jamilla Bess Johnson
John Norton
Peter Corea
Peggy Greene
Alison Greenwald
Tom Beers
Cathy Carpino
Julius Knapp